

NTSB Order No. EA-5241

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 27<sup>th</sup> day of July, 2006

Respondent.

Docket SE-17378

Respondent has appealed from the oral initial decision of Administrative Law Judge William J. Fowler, Jr., issued on August 23, 2005, following an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.123(a) and 91.13(a) of the Federal Aviation Regulations.<sup>2</sup> He modified the sanction by reducing the

<sup>2</sup> Section 91.123(a) prohibits, except in emergencies,

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proposed certificate suspension from 120 to 90 days. We deny the appeal.<sup>3</sup>

On September 1, 2004, respondent was the pilot-in-command of a passenger-carrying Part 121 flight that departed from Runway 28R at Pittsburgh International Airport. The aircraft was a Jetstream 4101. Respondent received a clearance for a "Pittsburgh Six" departure, which calls for a climb via heading 280 degrees thence to 1,700 MSL (mean sea level) before proceeding on course. It is undisputed that respondent did not do so, but instead, shortly after rotation, respondent turned left away from that heading and passed over active runways and the terminal at an altitude below 500 feet.

At the hearing, the Administrator contended that, because respondent did not declare an emergency, did not receive an amended clearance, and did not receive a TCAS warning, the violations have been established. Respondent argued instead that wake turbulence from a 737 taking off in front of him caused him to deviate from the clearance and, therefore, his action should be excused.

The law judge affirmed the complaint. In his findings of

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deviations from air traffic control (ATC) clearances unless an amended clearance is obtained or the Traffic Alert and Avoidance System (TCAS) engages. Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another. In this case, the latter violation is "residual" or "derivative," and need not be separately proven. See Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there.

fact, he concluded that "something shook Respondent's plane," "this was not wake turbulence [but] was a disturbance," and that on takeoff there must have been, "some reason to cause him to make this sudden left turn." Transcript (Tr.) at 289. On appeal, respondent claims that these findings and others precluded the law judge from affirming the complaint. We disagree.

Respondent's explanation and the above findings do not address the requirements of the regulation itself. To avoid violating this regulation, a deviation from a clearance requires at least one of three things: an amended clearance; a TCAS alert; or a valid emergency. Respondent had no amended clearance and no TCAS alert. And, although an emergency need not be "declared" to be valid,<sup>4</sup> Title 14 C.F.R. 121.557(c) provides:

Whenever a pilot in command or dispatcher exercises emergency authority, he shall keep the appropriate ATC facility and dispatch centers fully informed of the progress of the flight. The person declaring the emergency shall send a written report of any deviation through the certificate holder's operations manager, to the Administrator. A dispatcher shall send his report within 10 days after the date of the emergency, and a pilot in command shall send his report within 10 days after returning to his home base.

There is no indication in the record that respondent kept, "the appropriate ATC facility and dispatch centers fully informed of the progress of the flight" (not even in flight after the event),

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<sup>3</sup> The Administrator has not appealed the sanction reduction.

<sup>4</sup> Administrator v. Scott, NTSB Order No. EA-4003 (1993).  
Sections 121.123(a) and (b) also do not require the declaration  
(continued...)

nor was any report filed with the Administrator.<sup>5</sup>

The Administrator presented three eye-witnesses - all FAA inspectors - each of whom testified that when they saw the aircraft it was at about 100-200 feet altitude above ground level (AGL), and turning left over runways and the terminal area.<sup>6</sup> The Administrator's witnesses also testified, based on radar data, that respondent's aircraft rotated approximately 2,700 to 3,000 feet down the 10,500-foot runway and that, by the time it was at 400 feet altitude AGL, it was already outside the prescribed departure pattern, turning left, and encroaching on other runways.

Respondent, on the other hand, had a less clear version of events. In his company reports, he alternatively states that he hit the wake turbulence at acceleration height and at approximately 400 feet AGL (Exhibits A-15 and 16). At the hearing, he testified that he felt the yaw at rotation.

The disturbance could not have been at 400 feet because at that point he had already turned left. The radar data actually shows that the turn began at 1,300 feet MSL. As the airport is at 1,204 MSL, the aircraft was actually only 96 feet above the ground when it began its turn.

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of an emergency.

<sup>5</sup> We would not expect a pilot to put aside immediate actions necessary to respond to the emergency in order to call ATC, but to do so as soon as possible afterwards.

<sup>6</sup> Radar data showed the aircraft 296 feet above the ground when flying over the terminal. Tr. at 125.

As the Administrator notes, acceleration height and 400 feet AGL are not the same. Acceleration height for this aircraft was 500 feet AGL,<sup>7</sup> not considerably different, but still higher than when, according to the undisputed radar data, respondent began his turn.

Respondent's witnesses did not rebut the Administrator's evidence. Respondent's first officer offered two different versions of events, one similar to respondent's and the other denying any turbulence at all. The law judge made no credibility finding regarding this witness and need not have, given the extensive other evidence. The law judge placed no reliance on that testimony, nor do we.

Respondent's expert witness, who did not see the event, hypothesized that respondent had encountered a "disturbance" that was not wake turbulence.<sup>8</sup> Clearly the witness was unable, and did not attempt, to describe the extent or strength of that "disturbance," and there is no basis from his evidence to conclude that respondent's circumstances constituted an emergency for which he was authorized to depart from his clearance. We

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<sup>7</sup> The Administrator uses 1,704 feet, but that is MSL, not AGL.

<sup>8</sup> Respondent testified that he was unable to say how far away the 737 was when the Jetstream took off. Obviously, this information is required to determine objectively whether wake turbulence - or any disturbance for that matter - could have occurred and interfered with respondent's takeoff. Respondent, with no basis, challenged the Administrator's failure to preserve the radar data from the 737. Respondent had adequate time to seek that data from the FAA after it became apparent that the FAA would examine the incident, should he have determined it relevant (continued...)

have no difficulty finding on this record that the law judge's decision is supported by a preponderance of the reliable evidence.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 90-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>9</sup>

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

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to his defense.

<sup>9</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).